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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 188.

EDWARD H. TITUS, *Petitioner*,

v.

LOU C. WALLICK, *Respondent*.

On Writ of Certiorari to the Supreme Court of Ohio.

SUPPLEMENTAL BRIEF OF RESPONDENT RE INDEPENDENT NON-FEDERAL GROUND ADEQUATE TO SUPPORT JUDGMENT BELOW.

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THE JUDGMENT BELOW WAS BASED UPON AN INDEPENDENT NON-FEDERAL GROUND ADEQUATE TO SUPPORT IT.

This court has frequently held that where an independent and adequate non-Federal ground of decision exists review may not be had in this court even though the State court in terms purports to decide a Constitutional question and decides it erroneously. (*Fox Film Co.* v. *Muller,* 296 U. S. 207, 210, and cases cited) The view that the existence of a Constitutional question in the State court record gives this court jurisdiction over the whole case, empowering it to de-

cide every question presented in the record whether of State or Federal law, has been definitely rejected by this court. (*Murdock* v. *Memphis*, 20 Wall. 590)

An examination of the decision of the Court of Appeals below shows that it was based upon two grounds, (1) that plaintiff was not the real party in interest in the *Ohio suit* within the meaning of an Ohio Statute (General Code of Ohio Sections 11241, 11244) providing that an action must be prosecuted in the name of the real party in interest, and (2) that plaintiff practiced fraud in procuring the New York judgment. It is obvious that if the judgment below is based in part upon the first ground above stated, it constitutes an independent non-Federal ground adequate to support it.

That there is this non-Federal basis to the decision below seems unquestionable from an examination of the record. There was no written opinion in the Court below, the Supreme Court of Ohio. The Court simply dismissed the appeal "for the reason that no debatable constitutional question" was involved in the case (R. 195). However, the intermediate Ohio court, the Court of Appeals, rendered a written opinion from which it is clear that there was the question *in the Ohio courts*, as to whether the plaintiff in bringing the present suit was the real party in interest within the meaning of the *Ohio law*. Thus the Court of Appeals, in its opinion states:

> "The trial court's opinion is before us. The conclusion is there reached that the plaintiff, in the suit in New York and *in the action here*, was not the real party in interest and that the judgment in New York was secured by fraud practiced by the plaintiff upon the court and the defendant, in suppressing the fact that he was not the real party in interest." (R. 180; italics ours)

The court further said:

> "With the finding that the plaintiff was not the real party in interest in the actions *in Ohio* and in New

York we are in accord upon a fair consideration of the status of the plaintiff, his brother and defendant." (R. 180; italics ours)

The court after referring to the "Article of Agreement" (R. 181-183) and analyzing it states:

"Upon this whole instrument, then, over and beyond the power of attorney granted to Edward he had no interest whatever except the contingency provided for in (f). The action instituted in New York and *in Ohio* did not proceed as one wherein Edward was plaintiff as attorney for Walter as provided in Condition 2 of the agreement, but in his own name and right. The power of attorney will not support the action in the form in which it has been prosecuted, nor was the contingent interest of Edward such as that it would authorize him in his own name to be a proper party plaintiff.

"Sections 11241 and 11244, G. C. (General Code of Ohio) are, insofar as they relate to the instant action, substantially the same as Section 210 of the Civil Practice Act of the State of New York, (fol. 266) which provides that:

'An action must be prosecuted in the name of the real party in interest except that . . . a trustee of an express trust, . . . may sue without joining with him the person for whose benefit the action is prosecuted.'

"And in Ohio the exception has been considered in Brown v. Ginn, 66 O. S., 316, which holds that:

'In order to constitute one a trustee of an express trust within the meaning of the statute, the right and duty to bring the action must be incidental to the other powers and duties under the assumed trust, and the authority must not be confined simply to the bringing of an action to collect the subject of the contract which purports to create the trust, and to pay the next proceeds over to the assignor.'

"See also Hadden v. Rowe, 3 O. Opinions, 68 (130 O. S., 10)." (R. 183; italics ours)

Further, the court said, referring to the affidavit:

> "But the plaintiff, though cognizant of the purpose for which the affidavit was introduced . . . did not attempt to explain the subject matter of the affidavit which was under consideration. On the contrary, the plaintiff stands upon the record and urges that his position as set forth in the affidavit is not inconsistent with his right to maintain the action in New York and *the action here.*" (R. 186; italics ours)

Concluding on this point, the court said:

> "The trial court committed no prejudicial error in holding that the plaintiff was *neither in Ohio* nor in New York a real party in interest in the *respective actions here and there.*" (R. 186; italics ours)

Not only does the opinion of the Court of Appeals indicate that that court held that under *Ohio law* plaintiff was not the real party in interest in the Ohio suit but the Conclusions of Law in the trial court show that this was one of the grounds of decision in that court. The trial court entered the following "Conclusion of Law":

> "3. The court finds as a conclusion of law that the plaintiff herein is not the real party in interest in *this* action and has no right to maintain *this* action in his name." (R. 173; italics ours)

The opinion of the trial court states:

> "The amended answer sets up the defenses:
>
> . . . . . .
>
> 2. The plaintiff *in the action at bar*, here in *Franklin County*, Ohio, is not the real party in interest." (R. 148; italics ours)

The Assignments of Error in the Court of Appeals are to the same effect. The Sixth Assignment of Error is as follows:

> "6. The court erred in its conclusions of law No. 3, that 'the plaintiff herein is not the real party in inter-

est in *this* action and has no right to maintain this action in his name." (R. 177; italics ours)

It seems clear from the above that the Ohio courts consistently held, *as a matter of fact*, that plaintiff was not the real party in interest within the meaning of Sections 11241 and 11244 of the General Code of Ohio.

An analysis of the opinion of the Court of Appeals shows that for eight pages it is devoted to a consideration of whether the plaintiff was the real party in interest within the meaning of the Ohio Code (R. 178-186). The court concluded that examination by stating:

> "The trial court committed no prejudicial error in holding that the plaintiff was neither in Ohio nor in New York a real party in interest in the *respective actions here and there.*" (R. 186; italics ours)

An examination of that part of the opinion dealing with the present question shows that the Court of Appeals below held that the plaintiff was not the real party in interest, *as a matter of fact*, based upon the trial court's reliance upon the affidavit of August 17, 1934, as stating that prior to November 23, 1925, plaintiff had assigned his interest to Walter L. Titus (R. 180). In arriving at this conclusion the trial court, affirmed by the Court of Appeals, considered the claim that the plaintiff became the real party in interest by reason of a so-called "Article of Agreement" of December 1, 1925, and refused to allow the claim, holding under the Ohio decisions that the "Agreement" was a mere power of attorney to sue. (Trial Court's opinion R. 150; Appellate Court's opinion R. 185, 186).

In ruling on its effect, the trial court said that if claim be made that plaintiff's suit

> "in New York and *in this court* is based on his having a suable interest by virtue of the instrument of December 1, 1925." (R. 156; italics ours)

(which both the trial court and the Court of Appeals repudiated), then what of the affidavit? (Trial Court R. 156; see also Court of Appeals Decision, R. 185, 186) This decision of the trial court and of the Court of Appeals is based upon a *finding of fact* at least insofar as both courts follow the affidavit of August 17, 1934, and repudiate the agreement of December 1, 1925. This amounts to a finding of fact by a lower state court concurred in by the Appellate Court. The rule of this court in such cases is that such findings of fact concurred in by both trial and Appellate courts will not be disturbed.

293 — *Radio Corporation* v. *Radio Engineering Laboratories*, ~~296~~ U. S. 1, 6;
U. S. v. *State Investment Co.*, 264 U. S. 206, 211;
Texas and No. R. Co. v. *Brotherhood*, 281 U. S. 548, 558;
U. S. v. *Commercial Credit Co.*, 286 U. S. 63, 67.

Respondent's *pleadings* further show that one of the grounds of defense was that plaintiff was not the real party in interest in the Ohio statute under *Ohio law.* Thus respondent's answer to the first pleading filed states:

> "Further answering the defendant says that he is informed and therefore believes and alleges that the plaintiff is not the real party in interest *in this action.*" (R. 24; italics ours)

The plaintiff moved to strike the defendant's answer and in defendant's answer brief to this motion to strike, defendant stated:

> "Let us now direct the court's attention to the fourth paragraph of this answer, to the allegation that the plaintiff is not the real party in interest. If the plaintiff is not the real party in interest, of course he cannot prosecute the action at bar." (R. 28; italics ours)

In another answer brief the defendant raised the same uestion of the Ohio State law:

> "Counsel cite some New York statutory law on the question of real party in interest. Whether or not that is the New York law we do not know. In the first place it would need to be proven and in the second place the *Ohio real party in interest statute* is procedural and we submit that it is an elementary proposition of the law of conflicts that as to procedure the law of the forum applies." (R. 37; italics ours)

he amended answer likewise states:

> "Further answering the defendant says that the plaintiff is not the real party in interest in *this* action." (R. 40; italics ours)

Both the Ohio and the New York statutes simply pro- ide that the suit must be brought by "the real party in nterest" (Sections 11241, 11244 General Code of Ohio; Civil Practice Act of New York, Section 210), leaving it to he Courts, here the courts of Ohio, to decide what, under Ohio law, the real party in interest means in the Ohio stat- ute and whether *in fact* plaintiff was the real party in in- terest in the Ohio court.

The above difficulty seems to have been not unsuspected by counsel for petitioner, as in their Brief on Writ of Certiorari petitioner attempts to show that in arriv- ing at the conclusion that the plaintiff was not the real party in interest under *Ohio* law, the Ohio courts had first to determine that he was not the real party in interest under New York law. Petitioner states in his Brief on Writ of Certiorari:

> "To find that petitioner was not the real party in interest under the Ohio law, the Ohio courts determined first that petitioner was not the real party in interest in the New York suit and that he perpetrated a

> fraud upon the New York courts. In making such determination, the Ohio courts went, automatically, behind the New York judgment conclusive, as to all matters which were actually determined and all matters which might have been litigated—including the defense of lack of capacity to sue." (Brief for Petitioner on Writ of Certiorari, p. 34)

Even assuming this to be so, namely, that the Ohio court reached the juridical determination that plaintiff was not the real party in interest in the Ohio suit by a mode of reasoning which involved differing with the New York decisions on real party in interest, still this does not make the Ohio court's decision any the less a decision of fact and the application of its own law, having nothing to do with any question of Full Faith and Credit.

The question is not being argued *in vacuo*: the point must be discussed bearing in mind the limitations upon the jurisdiction of this court with reference to review of state court decisions. There is nothing to show that before the Ohio court could determine that plaintiff was not the real party in interest under the Ohio law and so had no right to maintain the Ohio suit, it would have to hold that plaintiff was not the real party in interest in New York. The determination of plaintiff's right to bring the Ohio suit in the Ohio court could have been entirely independent of the New York adjudication, and indeed, in theory of law must be considered to have been independently arrived at, inasmuch as the Ohio court must first have determined whether plaintiff was the real party in interest *in Ohio* before considering any question whatever relative to the validity of the judgment in New York. This question would not necessarily be determined by an examination of the New York judgment, which would only enter the case as an item of proof, *after* the Ohio court had determined that plaintiff had the necessary standing to sue.

Petitioner's claim in his brief on Writ of Certiorari (p. 34) that the findings of the Ohio courts that petitioner was not the real party in interest and perpetrated a fraud upon the New York courts, are completely interwoven with the denial of Full Faith and Credit, under *Fiske v. Kansas* 274 U. S. 383, 385; *Kansas City Southern R. Co. v. Albers Commission Co.*, 223 U. S. 573, 591, do not permit this court to overturn the decision of the Ohio State Courts on a question of Ohio State law. In these cases the violation of the Federal right depended upon the existence in the record of certain facts. This court simply held that it could examine the record to see if the facts were there, or how they were there. But no such claims can be made here. If the Ohio courts determine that under the laws of Ohio the plaintiff was not the real party in interest in the present suit there would be no deprivation of a Federal right. How the Ohio courts arrived at that conclusion is beside the point. The plaintiff has no right under the Federal Constitution or laws to be regarded as a real party in interest when he files a suit in an Ohio state court. Even assuming the Ohio state court decided wrongly, this error could be corrected only on appeal in the Ohio state courts, which courts evidently felt there was nothing in the point. Even assuming that the Ohio state statute was similar to the New York state statute, that construing the Ohio state statute against plaintiff prevented the Ohio court, on the ground of judicial consistency, from holding that he was the real party in interest in New York, our answer is still the same: the New York judgment has not been impeached in the Constitutional sense, the Ohio court has simply held that *in the Ohio court* the plaintiff is not the real party in interest within the meaning of an Ohio statute. The fact that the New York statute is similar in words to the Ohio statute is a mere coincidence with respect to a determination of whether the plaintiff comes within the Ohio statute. There is no legal connection between the two questions and

it is respectfully submitted that this court, by reason of downright jurisdictional restrictions, is not permitted to inquire into the validity of the Ohio court's decision applying the Ohio state law.

After all, the Ohio state court has simply held the plaintiff has not followed the proper procedure in the Ohio State courts. The decision below has destroyed no substantive rights, it has simply held that the plaintiff did not follow the proper procedure in bringing his suit because of violation of a specific Ohio statute. A decision by the Ohio courts as to the right of plaintiff to sue in Ohio was a pre-requisite to the suit on the New York judgment. Even assuming that the judgment was perfectly valid and unimpeachable in New York, there is nothing in the Full Faith and Credit clause requiring the Ohio courts to permit a suit except in accordance with the Ohio State Code governing such suits. A preparatory step toward permitting any suit at all to be maintained on the New York judgment in the Ohio courts was the necessary finding by the Ohio courts that the plaintiff complied with the provisions of the Ohio State Code relative to being the real party in interest. If he was not the real party in interest within the meaning of the Ohio statute (not the New York statute) there was no opportunity for the Ohio court to exercise its jurisdiction and grant the relief prayed for and hence no opportunity to violate the Full Faith and Credit clause.

It is no argument against the decision below that the Ohio statute is somewhat similar to the New York statute, plus the argument that if the Ohio court was wrong in construing the New York statute it was likewise wrong in construing the Ohio statute. The point is, that however wrong hypothetically the Ohio court might be with respect to the New York statute, there is no power in this court to reverse the decision of the highest court of Ohio with referenec to the Ohio statute.

In this respect the present case is somewhat similar to *De Saussure* v. *Gaillard*, 127 U. S. 216, 233, wherein the

highest court of South Carolina held that the plaintiff in the case was not a proper party to bring suit. In spite of this the court went on to decide a Federal question. When the case came to this court, this Court, after pointing out that the state court had held that the plaintiff did not come within the class of persons entitled to bring the suit, after which the state court decided the Federal question, remarked:

> "It thus appears that in point of fact the Supreme Court of the State of South Carolina in its opinion in this case passed upon the Federal question sought to be raised by the plaintiff as the foundation of his case, and decided it adversely to him; but the analysis of the case which we have made shows clearly that the decision of that question was not necessary to the judgment. Before reaching that question, the Supreme Court had already decided that the action of the plaintiff could not be sustained, according to the meaning of the provisions of the statute under which it was brought. The decision of that point was final, and was fatal to the plaintiff's right of recovery. That question is not a federal question; it does not arise under the Constitution of the United States, or of any law or treaty made in pursuance thereof. It is not a question, therefore, which, under, this writ of error, we have a right to review. We are not authorized to inquire into the Grounds and reasons upon which the Supreme Court proceeded in its construction of that statute. It is a state statute conferring certain rights upon suitors choosing to avail themselves of its provisions upon certain conditions in certain cases. Who may sue under it, and when, and under what circumstances, are questions for the exclusive determination of the state tribunals whose judgment thereon is not subject to review by this court." (De Saussure v. Gaillard, 127 U. S. 216, 232, 233)

In the same way this court has held generally that state court rulings declining jurisdiction on the ground that the

plaintiff has mistaken the court or his remedy affords an adequate non-Federal ground for decision. See:

People of New York ex rel. Doyle v. *Atwell*, 261 U. S. 590.
Farson v. *Bird*, 248 U. S. 268, 271.
Yesler v. *Commissioners*, 146 U. S. 646, 657.
Ohio ex rel. Eastman v. *Stuart*, 291 U. S. 643.
Allison v. *Texas*, 295 U. S. 717.

In the same way this court has held in *Rogers* v. *Jones*, 214 U. S. 196, that where a state court had held that the plaintiff had not stated a cause of action within the meaning of the state statute, there was an adequate non-Federal ground of decision.

This court has held in *John* v. *Paullin*, 231 U. S. 583, that no Federal right is denied by a state court in dismissing an appeal on the ground that its jurisdiction was not invoked in accordance with the laws of the state, the state having the right to prescribe the jurisdiction of its appellate courts and the mode of invoking it. The same is true in the present case with respect to the Ohio statute limiting the jurisdiction of its courts to the real parties in interest.

In *Newman* v. *Gates*, 204 U. S. 89, this court was asked to review a decision of a state court involving the Full Faith and Credit clause. The case had been taken to the highest court of the state which dismissed the appeal for failure to substitute the personal representatives of a deceased appellant. In holding that this court had no jurisdiction, this court said:

> "Had the appeal been properly taken it would have been the duty of the Supreme Court of Indiana to pass upon the question presented by the record before it, including, it may be, a Federal question, based upon the Full Faith and Credit Clause of the Constitution, which, on various occasions, was pressed upon the attention of the trial court. In legal effect, however, the case stands as though no appeal had been prosecuted from the judgment rendered by the trial court." (p. 95)

It is submitted that there is no distinction in principle between the inability of this court to consider an alleged Federal question not ruled on by the higher state court because the case was not properly before it and the present situation wherein the case was never properly in the state courts at all.

As to a possible claim of *res judicata* as to the real party in interest the most that can be said by petitioner is that the New York courts *impliedly* held that plaintiff was the real party in interest in New York, inasmuch as they gave him a judgment. But the suit in Ohio was an entirely separate suit and no New York court could deprive the Ohio courts of their sovereign right to construe and apply their own statute and determine for themselves who was the real party in interest *in Ohio*. The judgment in New York would not foreclose this inquiry, for who was the real party in interest in the Ohio suit could never be raised in the New York case.

Even if the New York court had specifically decided the point, and held the plaintiff was the real party in interest under a New York statute word for word similar to the Ohio statute, the Ohio court was still free to differ with the New York court and hold the plaintiff was not the real party in interest in Ohio. Full Faith and Credit is not involved because in Ohio the issue was the right of plaintiff to maintain the Ohio suit which is antecedent to plaintiff's right to submit in evidence in this suit the New York judgment. *Res judicata* is inapplicable because whether the plaintiff was the real party in interest in Ohio could never have been passed on in New York.

In addition, a denial of the doctrine of *res judicata* does not raise a Federal question nor was certiorari applied for review such a question and so the point is not open to this court for decision. (*Alice State Bank* v. *Houston Pasture Co.*, 247 U. S. 240.) This court has decided that in cases between the same parties where the second action is upon a different claim or demand, the judgment in the prior action

operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. (*Cromwell* v. *County of Sac*, 94 U. S. 35, 353) In that case this court said:

> "In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action." (p. 353)

In the present case the Ohio suit on the New York judgment was a separate and distinct cause of action. (*Brown* v. *Fletcher*, 182 Fed. 963.) The suit was on the judgment alone with no disclosure whatever of any other cause of action. (R. 7) The defense of the lack of the real party in interest was not interposed in the New York suit and so by no conceivable argument can the doctrine of *res judicata* be interposed in the Ohio case. A defense of the lack of the real party in interest in the Ohio suit on the New York judgment, is analogous to the defense of the statute of limitations. Under this court's decision in *McElmoyle* v. *Cohen*, 13 Peters 312, 327, the defense of the statute of limitations of the forum can always be interposed against a suit on a foreign judgment. There is no substantial difference between a suit at the wrong time on a foreign judgment and a suit by the wrong party. If the state of the forum can prevent one without violating the Full Faith and Credit clause, it can prevent the other and the question of what facts make out a good defense under the state statute is always one for the state court to determine. As held in the *McElmoyle* case, *supra*, the state statute involves a plea to the remedy and consequently the *lex fori* must prevail.

As to Comity, Comity does not require the Ohio court to say that because plaintiff *might have* been the real party in interest in New York (the point was never raised) he

must therefore be the real party in interest in Ohio. It follows that the Ohio court was free to decide the point as it did and its judgment on a question of fact or of purely state law is final in this court.

CONCLUSION.

The decision of the Court of Appeals of Ohio that plaintiff was not the real party in interest under the Ohio statutes is conclusive in this court; (a) treating it as a finding of fact concurred in by the two (or three) Ohio courts, or (b) treating it as a matter of law involving the construction and application by the Ohio courts of Ohio State statutes.

Respectfully submitted,

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